STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

CAROL PIERFELICE, as Next Friend
of DOROTHEA MOORE,

Plaintiff,

vs. Case No. 2004-1754-NH

ST. JOHN HEALTH SYSTEMS;
FATHER MURRAY NURSING CENTER;
MARY MARTINEN, M.D.; and
JOHN B. RYAN, M.D.;
Jointly and Severally,

Defendants.

_____/

OPINION AND ORDER

The parties have filed various motions seeking sundry relief.

I. BACKGROUND

Plaintiff Carol Pierfelice filed this action on April 26, 2004 asserting defendants Mary Martinen, M.D. and John B. Ryan, M.D. are agents and/or employees of defendants St. John Health Systems and Father Murray Nursing Center. Plaintiff avers Dorothea Moore was living fairly independently until October 8, 2001 when she (Moore) fell at home, fracturing her hip. Moore had hip replacement surgery at St. John Macomb Hospital on October 9, 2001 and was transferred to St. John Macomb Rehabilitation on October 12, 2001 before going to the St. John Senior Community Facility on October 26, 2001.

Plaintiff contends Moore fell and fractured her left greater trocantor during physical therapy on October 28, 2001. Moore was left non-weight bearing on her left leg and continued

rehab until being moved to defendant Father Murray Nursing Center on November 7, 2001. By this time, Moore needed total care with her activities of daily living and was suffering from dementia. She slipped from her chair and fell to the floor on November 11 and 13, 2001, injuring her left leg and suffering from extreme pain.

Plaintiff avows defendant Dr. Martinen was informed of Moore's falls and her development of worsening decubitus ulcers. Defendant Dr. Martinen ordered an x-ray of Moore's left hip on November 16, 2001. The x-ray was taken on November 22, 2001 and revealed a dislocated left hip prosthesis. Defendant Dr. Martinen's only action was to direct defendant Father Murray Nursing Center's staff to call defendant Dr. Ryan and tell him about the dislocation. When defendant Dr. Martinen eventually called defendant Dr. Ryan herself, defendant Dr. Ryan did not believe the diagnosis and waited to schedule Moore for an appointment until after the Thanksgiving holiday.

Plaintiff claims Moore saw defendant Dr. Ryan on November 28, 2001 and was immediately transferred to St. John Macomb Hospital. Although her left leg was effectively beyond medically reasonable hope of repair, Dr. Sachinder S. Hans operated on Moore and inserted a Greenfield filter on December 4, 2001. Defendant Dr. Ryan reassigned Moore's case to Dr. Jeffrey Mendelson who also operated on Moore on December 4, 2001 to reduce the dislocation, perform an internal fixation of her femur fracture and release the flexion contracture of her left leg. Moore was transferred back to defendant Father Murray Nursing Center on December 8, 2001.

Plaintiff asserts Moore's physical condition continued to decline, gangrene set into her left leg and she became septic from infection. Moore was again taken to St. John Macomb Hospital on January 4, 2002. In order to save her life, Dr. Hans amputated Moore's left leg.

Accordingly, plaintiff's amended complaint alleges: I. Negligence, Malpractice and Wilful/Wanton Misconduct against defendant St. John Health; II. Negligence, Malpractice and Wilful/Wanton Misconduct against defendant Father Murray Nursing Center; III. Negligence, Malpractice and Wilful/Wanton Misconduct against defendant Dr. Martinen; IV. Negligence, Malpractice and Wilful/Wanton Misconduct against defendant Dr. Ryan and V. Statutory Abuse, Neglect and/or Common Law Failure to Protect against defendants St. John Health, Father Murray Nursing Center and Dr. Martinen.

The parties now seek sundry relief.

II. ANALYSIS

A. Noneconomic Damages in Excess of the Statutory Cap

Defendants St. John Health and Father Murray Nursing Center, joined by defendants Drs. Martinen and Ryan, move for partial summary disposition as to all claims for noneconomic damages in excess of the statutory cap.

MCL 600.1483(1) provides in pertinent part:

> In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting from the negligence of all defendants, shall not exceed $280,000.00 unless, as the result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply as determined by the court pursuant to section 6304, in which case damages for noneconomic loss shall not exceed $500,000.00:
>
> (a) The plaintiff is hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs caused by 1 or more of the following:
>
> (i) Injury to the brain.
>
> (ii) Injury to the spinal cord.
>
> (b) The plaintiff has permanently impaired cognitive capacity....
>
> (c) There has been permanent loss of or damage to a reproductive organ resulting in the ability to procreate.

In the instant matter, Moore lost her left leg allegedly as a result of defendants'

negligence.

A person who is hemiplegic has paralysis in one limb while a person is paraplegic or quadriplegic has paralysis in two or four limbs, respectively. Moore does not suffer from paralysis. Hence, the exception in MCL 600.1483(1)(a) is not applicable.

The complaint does not allege Moore suffers from permanently impaired cognitive capacity as a result of defendants' actions. Hence, the exception in MCL 600.1483(1)(b) is not applicable.

The complaint does not allege Moore has suffered any loss to a reproductive organ resulting in an inability to procreate. Hence, the exception in MCL 600.1483(1)(c) is not applicable.

Consequently, the lower noneconomic damages cap of $280,000—as adjusted for inflation, see MCL 600.1483(4)—applies.

However, the proper method for applying the noneconomic damages cap is to allow a plaintiff to present all the evidence of her noneconomic damages to the jury, permit the jury to render its award for any noneconomic damages and then have the court, if necessary, reduce the award for noneconomic damages to reflect the cap limit. *Kik v Sbraccia,* 268 Mich App 690, 705; 708 NW2d 766 (2005), citing *Jenkins v Patel,* 471 Mich 158, 172; 684 NW2d 346 (2004).

Therefore, defendants' motion for partial summary disposition as to all claims for noneconomic damages in excess of the statutory cap is denied.

B. Hearsay Evidence

Defendants St. John Health and Father Murray Nursing Center, joined by defendants Drs. Martinen and Ryan, move in limine to preclude plaintiff from giving hearsay testimony.

MRE 801(c) defines hearsay as "a statement, other than one made by the declarant while

testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted". Hearsay is generally inadmissible unless subject to one of the enumerated hearsay exceptions. MRE 802.

In the instant matter, defendants seek to prevent plaintiff from testifying as to "certain opinions regarding Dorothea Moore's medical condition, opinions of certain medical treaters, and criticisms of Father Murray Nursing Center by other doctors and/or professional individuals concerning the care and treatment rendered by Dr. Martinen and Dr. Ryan...and/or the extent of Dorothea Moore's alleged disability". However, it is possible (and highly likely) such testimony would qualify for admission under MRE 801(d)(2) as admissions by an opposing party; MRE 803(1) as present sense impressions; MRE 803(3) as statements of the declarant's then existing state of mind, emotion, sensation or physical condition; MRE 804(4) as statements made for purposes of medical treatment or diagnosis; MRE 803(21) regarding reputation as to character; MRE 803(24) under the catchall exception; MRE 804(b)(2) as statements made under belief of impending death (e.g., if Moore had said something); MRE 804(b)(3) as statements against interest and/or MRE 804(b)(7) under the catchall exception.

The obvious problem with defendants' shotgun approach to excluding all hearsay testimony is the absence as to what that testimony is actually going to be. Inasmuch as there are several proper purposes for the use of hearsay evidence, an outright ban on the use of hearsay testimony is not appropriate.

Nonetheless, the parties are forewarned that abuses will not be tolerated and will be dealt with appropriately (e.g., sanctions including new trial, dismissal, costs and/or fees).

Accordingly, defendants' motion in limine to preclude plaintiff from giving hearsay testimony is denied.

C. Expert Testimony Regarding
a Breach of the Standard
of Care by Nurses

Defendants St. John Health and Father Murray Nursing Center move to preclude plaintiff's physician experts from testifying to a breach in the standard of care by nurses.

In *McElhaney v Harper-Hutzel Hosp,* 269 Mich App 488; 711 NW2d 795 (2006), the court stated OB/GYN expert witnesses (i.e., physicians) were not qualified to testify as to the standard of care applicable to nurse midwives (who are registered professional nurses with specialty certification in the practice of nurse midwifery).

Plaintiff's expert, Dr. Karl E. Steinberg, is a physician who spends 80% of his time practicing family medicine and 20% of his time as a medical director. However, he is not a licensed nurse. Hence, Dr. Steinberg is not qualified to provide testimony regarding the standard of care applicable to nurses.

Therefore, defendants St. John Health and Father Murray Nursing Center's motion to preclude plaintiff's physician experts from testifying to a breach in the standard of care by nurses is granted. Accordingly, Dr. Steinberg is precluded from providing testimony regarding the standard of care applicable to nurses; only licensed nurses may provide the standard of care applicable to nurses.

D. Preclude Testimony of
Plaintiff's Life Care
Planning Expert

Defendants St. John Health and Father Murray Nursing Center, joined by defendant Dr. Ryan, move to preclude or limit the testimony of plaintiff's life care planning expert, Laura Lee Kling.

Kling is a registered nurse who has calculated the cost of a life care plan for Moore,

which plaintiff will apparently use to establish future damages.

In *Berryman v Kmart Corp,* 193 Mich App 88, 98; 483 NW2d 642 (1992), the court explained:

> Under MRE 702, which governs the admissibility of expert testimony, the critical inquiry is whether the expert testimony will aid the trier of fact in reaching its ultimate decision. [Cite omitted.] Admission of expert testimony requires that (1) the witness be qualified as an expert, (2) the expert's proposed testimony "must serve to give the trier of fact a better understanding of the evidence or assist in determining a fact in issue," and (3) the witness' testimony "must be from a recognized discipline." [Cite omitted.]
>
> The decision to admit or exclude expert testimony is within the sound discretion of the trial court and will not be reversed on appeal absent a clear abuse of discretion. [Cite omitted.] In evidentiary rulings, an abuse of discretion will be found "only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made." [Cite omitted.]

As a preliminary matter, plaintiff has not explained exactly what qualifies Kling as a life care planning or cost expert. Indeed, plaintiff has not proffered any evidence as to the reliability of Kling's proposed testimony. *Gilbert v DaimlerChrysler Corp,* 470 Mich 749; 685 NW2d 391 (2004). In this regard, Kling's life care plan states a neuropsychologist can best predict Moore's specific needs, recommend a current course of treatment and recommend supportive services that would be required in the event Moore is taken home. Kling also testified she was unable to interpret Moore's Mini Mental Status Examination test results.

Significantly, Kling's life care plan costs include, as caveats, that the life care plan is based on very limited information and all calculations must be adjusted by an economist. Kling also testified she did not have Moore's complete medical history available for review when she (Kling) formulated the life care plan.

Importantly, Kling fails to distinguish between care that Moore would need regardless of the alleged malpractice and the increased care that she may need due to the alleged negligence.

Kling includes care items that are not supported as necessary by the medical evidence (e.g., need for physical therapy or occupational therapy evaluations, a case manager, certain drugs). Kling asserts the need for new home to accommodate Moore rather than modifications to her son's house where she had been living and the need for a van with a wheelchair lift (assuming arguendo that Moore is ever capable of living outside an extended care facility, which is apparently unlikely due to significant cognitive problems including Alzheimer's and organic psychoses); query exactly what makes Kling a real estate or automotive expert.

The obvious lack of evidentiary basis to Kling's life care plan and costs diminishes its relevance and creates a great risk of prejudice from allowing her testimony. MRE 402 and 403. The jury would likely give Kling's testimony undue weight.

Moreover, to the extent Kling's plan is based on the conclusions of others, her testimony is unmistakably based on hearsay. Kling's testimony would also be redundant; if someone else is testifying as to the need for certain services, the jury should be able to keep track of such items without the need for another person to present a tally. MRE 403. Kling further fails to determine and/or note whether Moore has any available insurance coverage.

Therefore, defendants St. John Health, Father Murray Nursing Center and Dr. Ryan's motion to preclude the testimony of Kling is granted. MRE 104(a).

E. Partial Summary Disposition
as to Defendant Dr. Martinen

Defendant Dr. Martinen, joined by defendants St. John Health and Father Murray Nursing Center, seeks partial summary disposition of plaintiff's claim for medical malpractice based on a failure to order proper fall precautions (on grounds plaintiff's expert, Dr. Stephen Wayne Hosea, did not offer standard of care testimony in this regard, instead deferring to someone who specializes in geriatrics) and claim for statutory abuse/neglect for failure to order

proper fall precautions (on grounds that this claim is really for medical malpractice).[1]

Dr. Hosea testified defendant Dr. Martinen violated the standard of care with respect to her failure to order proper fall precautions. While Dr. Hosea stated that he was "not familiar with exactly what those fall precautions are for a nursing home", he did identify several options—including commonsense—that defendant Dr. Martinen could have used to prevent Moore from falling. In any event, Dr. Hosea's deference as to exactly what fall precautions should have been ordered is largely moot inasmuch as defendant Dr. Martinen apparently failed to order *any* fall precautions. Thus, plaintiff has an identified basis of expert testimony to support a claim of medical malpractice based on a failure to order fall precautions.

With respect to plaintiff's claim for statutory abuse and neglect, Dr. Hosea testified that he 'did not find any indication that Moore had been abused in defendant Father Murray Nursing Center's records'. However, it is less than clear whether Dr. Hosea was stating Moore had not been abused or there was no documentation of abuse; Dr. Hosea was not asked any clarifying follow-up questions.

Dr. Steinberg testified there was no statutory abuse but that there was statutory neglect. He explained the statutory neglect was based on medical neglect, the failure to provide necessary medical services in a timely fashion (e.g., the failure to immediately send Moore to the hospital when the x-ray revealed she had a dislocated hip prosthesis). Dr. Steinberg agreed the medical neglect was based on the same violations of the standards of care as the medical malpractice claim.

Inasmuch as plaintiff's medical neglect claim occurred within the course of a professional relationship and raises questions involving medical judgment, the claim clearly sounds in

[1]As an aside, defendant Dr. Martinen attached the deposition of Dr. Hosea from *Del Agua v Highland County Health Dept* (Tenth Judicial Circuit Court of Florida, Case No. GC02-0612) rather than this matter.

malpractice. See, e.g., *Bryant v Oakpointe Villa Nursing Centre, Inc,* 471 Mich 411; 684 NW2d 864 (2004)[2], and *Tierney v Univ of Michigan Regents,* 257 Mich App 681; 669 NW2d 575 (2003).

Therefore, defendants Dr. Martinen, St. John Health and Father Murray Nursing Center's motion for partial summary disposition of plaintiff's claim for (1) medical malpractice based on a failure to order proper fall precautions is denied and (2) statutory abuse/neglect is granted in favor of a claim for medical malpractice, which plaintiff's complaint shall be deemed amended to so allege.

F. Defendant Dr. Ryan's Motion
for Summary Disposition

Defendant Dr. Ryan, joined by defendants St. John Health and Father Murray Nursing Center, moves for summary disposition on the issue of causation. In short, defendant Dr. Ryan argues there is no evidence as to when the dislocation occurred, that the delay in diagnosing and treating the dislocated hip prosthesis effected the outcome of the reduction and/or what caused the neurovascular injury that led to the amputation of Moore's left leg.

In *Robins v Garg,* ___ Mich App ___; ___ NW2d ___ (2006), the court stated:

> "In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants." MCL 600.2912a(2). "Proximate cause" is a term of art that encompasses both cause in fact and legal cause. *Craig v Oakwood Hosp,* 471 Mich 67, 86; 684 NW2d 296 (2004). "Generally, an act or omission is a cause in fact of an injury only if the injury could not have occurred without (or 'but for') that act or omission." *Id.* at 87. Cause in fact may be established by circumstantial evidence, but the circumstantial evidence must not be speculative and must support a reasonable inference of causation. *Wiley v Henry Ford Cottage Hosp,* 257 Mich App 488, 496; 668 NW2d 402 (2003). " 'All that is necessary is that the proof amount to a

[2]First issue in determining whether claim sounds in negligence or medical malpractice is whether the claim is being brought against someone or an entity that is capable of malpractice. Second issue is whether alleged improper action arose within the course of a professional relationship and raises question of medical judgment. *Id.* at 420-425. (A 'yes' to these issues would establish a claim for medical malpractice.)

> reasonable likelihood of probability rather than a possibility. The evidence need not negate all other possible causes, but such evidence must exclude other reasonable hypotheses with a fair amount of certainty.' " *Skinner v Square D Co,* 445 Mich 153, 166; 516 NW2d 475 (1994), quoting 57A Am Jur 2d, Negligence, § 461, p 442. Summary disposition is not appropriate when the plaintiff offers evidence that shows "that it is more likely than not that, but for defendant's conduct, a different result would have obtained." *Dykes v Wm Beaumont Hosp,* 246 Mich App 471, 479, n 7; 633 NW2d 440 (2001).

Dr. Kendall Shannon Wagner repeatedly testified Moore lost her leg because her dislocated hip prosthesis was not reduced on November 23, 2001. Defendant Dr. Ryan's contrary quotations of Dr. Wagner's testimony are piecemeal attempts to take Dr. Wagner's testimony out of context in an attempt to marginalize his opinions.

First, defendant Dr. Ryan notes Dr. Wagner does not know when the dislocation occurred—with there being evidence that it could have occurred on November 19, 2001 rather then November 22, 2001 (the date of the x-ray)—or what caused the dislocation. In reality, this is a red herring argument that only supports Dr. Wagner's statement that a dislocated hip prosthesis should be treated as a neurovascular emergency because the longer it remains displaced, the harder it is to reduce by closed (i.e., nonsurgical) means. The fact that the dislocation could have occurred as early as November 19, 2001 (when the records indicate Moore began complaining of pain in her leg) would only underscore the delay that was magnified by defendant Dr. Ryan's decision not to see Moore until after the Thanksgiving holiday. Moreover, the cause of the dislocation (falling or over twisting of the leg or excessive laxity) is irrelevant: the issue is defendant Dr. Ryan's alleged failure to timely treat the injury *however it occurred.*

Second, while Dr. Wagner stated he did not think that he would be able to testify as to what day it became more likely than not that open reduction would be necessary to reduce the dislocated hip prosthesis, he did testify that by November 20, 2001 there would have been a 95%

chance of success by closed reduction, about the same chance by November 21, 2001; an 80-85% chance of success by closed reduction by November 22 or 23, 2001; a 75% chance of success by closed reduction by November 24-25, 2001; a 60-65% chance of success by closed reduction by November 25-26, 2001; and less than a 50% chance of success by closed reduction by November 27-28, 2001. Hence, why Dr. Wagner may not have been able to testify as to exactly what day it became more likely than not that Moore would need an open reduction, he did testify to a small range of days in which a closed reduction would more than likely have been successful (i.e., he did testify to the success rate of the converse procedure). Moreover, it would actually appear Dr. Wagner changed his testimony that an open reduction would more likely than not have been needed after November 27-28, 2001 (when his projected success rate of a closed reduction fell below 50%).

Third, while Dr. Wagner stated there was no factual basis in the record that a closed reduction performed on November 23, 2001 or before November 28, 2001 would have been successful, he stated his opinion on this issue was based on his years of training and experience as an orthopedic surgeon.

Fourth, for the reasons stated in argument number two, defendant Dr. Ryan's narrow argument that Dr. Wagner did not give a *specific* date between November 19, 2001 and December 4, 2001 on which Moore more likely than not would have been successfully treated with a closed reduction lacks merit.

Fifth, while Dr. Wagner could not cite a specific published source for the percentages cited, he did believe a published study would have a similar range of percentages based on the number of days post injury that a closed reduction would be attempted. Again, it is important to note Dr. Wagner based his percentages on his training and experience, which is sufficient to

withstand summary disposition given the apparent utter lack of contrary evidence.

Sixth, Dr. Wagner did not *rule out* Moore *might* have needed an open reduction on November 23, 2001. However, he reiterated his belief that more likely than not that the dislocated hip could have been reduced without surgery on November 23, 2001 had defendant Dr. Ryan actually acted on that day.

Seventh, Dr. Wagner did agree Moore could have suffered a neurovascular injury during a closed reduction and that findings of ischemia were not *noted* until after Dr. Mendelson attempted a closed reduction on December 4, 2001. However, Dr. Wagner referred to an H&P Note dated November 29, 2001 that documented Moore had decreased pulses in her left leg; he also noted a December 2, 2001 venous Doppler study failed to identify any blood flow (raising a high suspicion of deep venous thrombosis) and a statement in Dr. Mendelson's operative report from December 4, 2001 that Dr. Hans had been consulted and felt that 'this was an ischemic extremity'. Thus, there is evidence—before the closed and open reductions had been attempted on December 4, 2001—of a reduced blood flow to and from Moore's left leg (as evidenced by the decreased pulse and absent Doppler finding, respectively) that is suggestive of the beginnings of ischemia even if noted so noted in the records. Consequently, reasonable minds could easily conclude Moore's leg was well on its way of becoming ischemic prior to Dr. Mendelson's involvement and given defendant Dr. Ryan's failure to act earlier in reducing the dislocation.

Eighth, Dr. Wagner asserted his opinion that Moore's leg was not salvageable as of November 28, 2001 was based on his opinion that there was too much delay in seeking to perform a closed reduction and that a closed reduction would no longer be successful. In other words, the damage (dislocation, likely tissue and vascular damage, pooling of blood) had been done by this point. While there may have been no direct facts in the medical records that reached

this conclusion, Dr. Wagner can rely on his training and experience in reaching his conclusion that the length of time that had passed from the dislocation made saving Moore's leg extremely unlikely.

Ninth, whether the medical records indicate any of Moore's treating physicians stated her leg was medically unsalvageable during the November 28, 2001 admission is irrelevant to whether Dr. Wagner could reach that conclusion. At best, the lack of such a notation would affect the weight rather than the admissibility of Dr. Wagner's apparent opposing view. Significantly, the lack of such a notation in the medical records does not necessarily mean Moore's treating physicians believed her leg was salvageable; they may have attempted further procedures despite the odds in an attempt to avoid having to amputate Moore's leg.

Tenth, while Dr. Wagner's affidavit of merit stated Moore's hip became irreversibly damaged as of December 4, 2001 in contrast to his testimony of November 28, 2001, the change in his opinion would merely affect the weight to be given his testimony, rather than its admissibility.

Eleventh, as previously noted, the lack of a notation in Dr. Mendelson's operative report about Moore's leg being unsalvageable does not necessarily mean he believed the leg was salvageable. To the contrary, he may have operated against the odds in an attempt to save Moore's leg. (Of note, women have had breasts removed to avoid breast cancer that runs in their families although the women currently have no signs of cancer and diabetics—among others—are often subject to vascular surgeries that merely stave off amputations.) Hence, Dr. Wagner's acknowledgement that it would be *rare* for an orthopedic surgeon to do an open procedure on an unsalvageable leg does not mean an open procedure would never be done.

Twelfth, the mere fact that the record may not definitively establish the cause of Moore's

vascular compromise does not preclude Dr. Wagner from opining vascular compromise caused the loss of Moore's leg. The evidence of decreased pulse and lack of venous flow does support Dr. Wagner's conclusion even if he is unable to pinpoint the exact cause, especially in light of his testimony that the delay in attempting a closed reduction decreased the likelihood of a successful outcome.

Thirteenth, while Dr. Wagner agreed there was no vascular compromise when defendant Dr. Ryan saw Moore on November 28, 2001, the H&P Note from that date noted Moore had decreased bilateral pulses in her left leg. Thus, the evidence does suggest the potential beginning of vascular compromise when defendant Dr. Ryan saw Moore.

Fourteenth, (and again,) while there is no evidence of vascular compromise noted for the November 28, 2001 visit to defendant Dr. Ryan, the noted evidence of decreased bilateral pulses in Moore's left leg would suggest the beginnings of vascular compromise.

Fifteenth, the fact that the first note of vascular compromise may not have been made until December 4, 2001 is irrelevant in light of the evidence suggesting Moore was beginning to develop vascular compromise by November 28, 2001. Recall also that the December 2, 2001 venous Doppler study failed to identify any blood flow (the vascular system is comprised of arteries, capillaries *and veins*) and Dr. Hans' belief—at the time of surgery—that Moore's leg was already an ischemic extremity.

Sixteenth, Dr. Wagner's acknowledgement that attempts at obtaining a closed reduction of a dislocated hip prosthesis can cause vascular compromise does not means he believes the attempts at obtaining a closed reduction *in this case* resulted in vascular compromise. Again, the decreased bilateral pulses noted on November 28, 2001 would suggest the beginnings of vascular compromise predated Dr. Mendelson's attempts to achieve a closed reduction.

Seventeenth, the difference in opinion between Dr. Wagner (vascular compromise was a cause in fact of Moore losing her leg) and Dr. Hosea (the infection following the second dislocation on December 18, 2001 caused Moore to lose her leg) merely creates a question of fact for the jury to resolve.

As noted above, Dr. Wagner's opinion is supported by the evidence rather than being based on pure speculation and conjecture. Therefore, defendants Dr. Ryan, St. John Health and Father Murray Nursing Center's motion for summary disposition is denied.

III. CONCLUSION

For the reasons set forth above:

A. Defendants St. John Health Systems; Father Murray Nursing Center; Mary Martinen, M.D. and John B. Ryan, M.D.'s motion for partial summary disposition as to all claims for noneconomic damages in excess of the statutory cap is DENIED;

B. Defendants St. John Health, Father Murray Nursing Center, Dr. Martinen and Dr. Ryan's motion in limine to preclude plaintiff Carol Pierfelice from giving hearsay testimony is DENIED, without prejudice to renewal;

C. Defendants St. John Health and Father Murray Nursing Center's motion to preclude plaintiff's physician experts from testifying to a breach in the standard of care by nurses is GRANTED;

D. Defendants St. John Health, Father Murray Nursing Center and defendant Dr. Ryan's motion to preclude the testimony of plaintiff's life care planning expert, Laura Lee Kling, is GRANTED;

E. Defendants Dr. Martinen, St. John Health and Father Murray Nursing Center's motion for partial summary disposition of plaintiff's claim for:

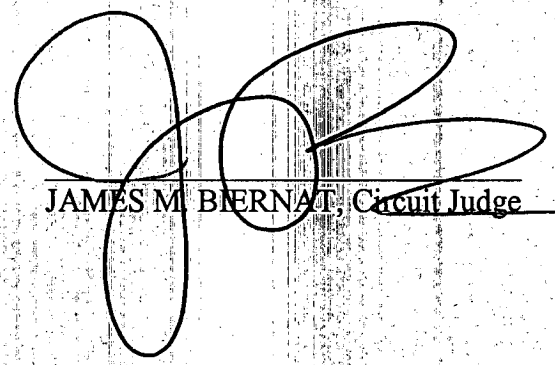
1. Medical malpractice based on a failure to order proper fall precautions is DENIED and

2. Statutory abuse/neglect is GRANTED with the caveat that plaintiff's complaint should be deemed AMENDED to allege this claim as a form of medical malpractice; and

F. Defendants Dr. Ryan, St. John Health and Father Murray Nursing Center's motion for summary disposition on the issue of causation should be DENIED.

This Opinion and Order neither resolves the last pending claim in this matter nor closes the case. MCR 2.602(A)(3).

IT IS SO ORDERED.



JAMES M. BIERNAT, Circuit Judge

JMB/kmv

DATED: June 30, 2006

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